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In The

Supreme Court of the United States

October Term, 1989

JOSEPH A. BONJORNO, LORRAINE KERR,
(EXECUTRIX OF THE WILL OF GEORGE M. KERR, JR.,)
AND BARBARA K. CLISBY,

Cross-Petitioners,

v.

KAISER ALUMINUM & CHEMICAL CORPORATION
and KAISER ALUMINUM & CHEMICAL SALES, INC.,

Cross-Respondents.

**On Writ Of Certiorari To The
United States Court Of
Appeals For The Third Circuit**

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KAISER'S ARGUMENTS DO NOT SUPPORT DENIAL OF ADEQUATE INTEREST FROM THE 1979 JUDGMENT

Kaiser, in its Brief for Cross-Respondents ("Kaiser Response"), – responding to Plaintiffs' Petition for an award of interest at commercial market rates, over the full period since the original 1979 judgment, – ignores this Court's holdings and contends that a court of law and equity is powerless[1] to protect and preserve the integrity of its own judgments[2] against decline in value resulting from delays in the judicial process,[3] and to carry out the fourfold purposes of interest awards in cases such as this:

- ¶ preserve judgments against diminution;
- ¶ prevent unjust enrichment of defendant at plaintiff's expense;
- ¶ vindicate congressionally mandated policy to preserve free trade;
- ¶ eliminate incentives for court delay after adverse judgment.[4]

Kaiser does not contest that its cost of money was at least prime rate or that it has benefited over the past ten years by more than $18.5 million from the use of Plaintiffs' money by delaying payment of the judgment for seven years and still avoiding any interest payments to this day. Instead, Kaiser contends that the Court of Appeals should not disgorge

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[1] *Cf.* Kaiser's inequitable argument that Courts of Appeals are powerless to award the amount of interest necessary and appropriate "in order *adequately to preserve the value of the judgment*." Kaiser Brief In Opposition to Plaintiffs' Cross-Petition at 6 (emphasis added).

[2] *Cf. Scripps-Howard Radio v. FCC*, 316 U.S. 4, 9-10 (1942) ("appellate court should be able to prevent irreparable injury" relating to enforcement and stay of execution on judgments); *Ex Parte Peterson*, 253 U.S. 300, 312 (1920).

[3] *See* Brief for Cross-Petitioners on the Merits of Plaintiffs' Cross-Petition ("Plaintiffs' Opening Brief") at 31-41; *see also* pp. 11-18 below.

[4] *See* Plaintiffs' Opening Brief at 13.

Kaiser's gain because Plaintiffs' loss – posits Kaiser without a shred of evidence – should be measured at savings account or T-bill rates. Kaiser Response at 30.

Kaiser ignores the record evidence that Plaintiffs' cost of money, in their desperate effort to rebuild a business destroyed by Kaiser, was 2.5 points *above* prime. (J.A. 290-91). Moreover, had Plaintiffs received their funds when due, and alternatively put them in an established investment fund, their $9.5 million as of 1979 would now be worth as much as from $34 to $120 million.[5]

Kaiser, to mask the gross inequities flowing from its contentions, and to divert attention from its begrudging and belated concessions regarding the fourfold purposes of interest,[6] ignores the real issues. Instead it poses a host of ill-conceived and misdirected arguments in its Response, that are not only unsupported, but are also irrelevant, make no common sense, and are flat wrong:

1. KAISER'S IRRELEVANT ATTEMPTS TO DOWN-PLAY ITS EGREGIOUS WRONGS: Kaiser Incorrectly Argues That Because Its Liability Was "Far From Clear," Interest Should Not Run From 1979 When Liability Was Established

Kaiser cannot now relitigate its liability which was established in 1979. Its self-serving declaration that its liability was "far from clear" is contradicted by the repeated affirmance of

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[5] *See* p. 16 n.28 below.

[6] Kaiser concedes that interest on the judgment should preserve the value of the judgment, but attempts to overlook the precedent and logic mandating that such interest run from the original judgment. *See* Kaiser Response at 16, 30.

Even on Kaiser's limited concessions, Kaiser's arguments in No. 88-1595 for 6% simple interest ($2.6 million) – or only one day of interest – seek results that manifestly fail to carry out the now conceded purposes of interest awards, and properly were rejected by the court below. The real issues for this Court are on Plaintiffs' Petition.

its liability in the face of each challenge by Kaiser.[7] Kaiser's refusal to accept the courts' judgments states no basis to deny interest over the seven years from establishment of liability in 1979 to this Court's denial of its second certiorari petition in 1986. To the contrary, Kaiser is bound not only by the 1979 liability findings that its predatory and anticompetitive conduct caused the destruction of Plaintiffs' business from the early 1970's to 1977, but also by the conclusive and preclusive determination of the 1981 jury that the only error of the 1979 jury was in awarding *too little* damages.

The 1979 judgment was correct on the facts and law of this case, except that it was $4 million too low. In affirming this 1979 liability and the 1981 damage recalculation, the Court of Appeals appropriately should grant interest on the judgment from 1979.[8]

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[7] The sufficiency of the evidence to establish liability under 15 U.S.C. §2 was determined by the Court of Appeals in 1978. Plaintiffs' Opening Brief at 3.

Kaiser's liability was established in 1979 – not 1986 (*cf.* Kaiser Response at 5-9) – and has never been reversed, overruled or vacated. Plaintiffs' Opening Brief at 4-5. To the contrary, the 1979 jury's liability finding was *affirmed:* (1) by the District Court on Kaiser's 1979 post-trial motions (J.A. 127); and (2) by the Court of Appeals in its 1984 judgment (J.A. 190-98), on which Plaintiffs seek interest.

See also Supplemental Brief For Respondents Occasioned By The Filing Of An Amicus Curiae Brief On Behalf Of The United States, No. 84-1907 (U.S.) (noting heavy weight of *cumulative evidence* on liability, independent of price squeeze issue Kaiser again seeks to relitigate).

[8] Kaiser's Response at 15 is flat wrong in suggesting that Kaiser could not have stopped or reduced interest either by tendering money to Plaintiffs instead of obtaining stays or by tendering money into court under Fed. R. Civ. P. 67.

In the Third Circuit, a Rule 67 payment into court *can* reduce the running of interest. *Devex Corp. v. General Motors Corp.*, 749 F.2d 1020, 1023 (3d Cir. 1984), *cert. denied*, 474 U.S. 819 (1985); *Devex Corp. v. General Motors Corp.*, 638 F. Supp. 940, 944 (D. Del. 1986), *aff'd*, 822 F.2d 52 (3d Cir. 1987), *reversed on other issue*, 108 S. Ct. 2862, *aff'd on remand*, 857 F.2d 197 (3d Cir. 1988); *Fassbinder v. Pennsylvania R.R. Co.*, 233 F. Supp. 574, 576 (W.D. Pa. 1964).

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2. KAISER'S IRRELEVANT ATTEMPTS TO BLAME PLAINTIFFS FOR DELAYS INHERENT IN THE JUDICIAL PROCESS AS A BAR TO THEIR INTEREST CLAIM: Kaiser Wrongly Argues That Courts Should Or Can Weigh Responsibility For Delays Inherent In The Judicial Process Absent Bad Faith

Kaiser's Response at 14 incorrectly attempts to deny Kaiser's obligation for 2½ years of interest on the judgment by contending that Plaintiffs were somehow at fault for delay. Kaiser's arguments are both irrelevant and incorrect:

Contrary to Kaiser's unsupported and ill-conceived argument, the cause for delay inherent in the judicial process is *irrelevant*, unless bad faith by the parties is shown,[9] which neither side has charged.[10] The wronged victim, not the adjudicated wrongdoer, is

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Indeed, one case relied on by Kaiser, *Blasini-Stern v. Beech-Nut Life Savers Corp.*, 429 F. Supp. 533 (D. Puerto Rico 1975), was noted by the advisory committee on amendments to Rule 67 as an example of a court improperly interpreting the intent of Rule 67. Fed. R. Civ. P. 67, Advisory Committee Notes, 1983 Amendment.

[9] As Kaiser notes in its Response at 28, Plaintiffs do not seek any punitive payments for bad faith dilatory conduct under Fed. R. App. P. 38, but rather seek full return of an accurate measure of the actual time value of money under Fed. R. App. P. 37. Both Rule 37 and Rule 38 present aspects of interest awards under 28 U.S.C. §1912, not 28 U.S.C. §1961.

[10] Kaiser has not even attempted to claim that Plaintiffs engaged in *any dilatory conduct. Cf. Redfield v. Ystalyfera Iron Co.*, 110 U.S. 174 (1884) (laches by plaintiff waiting 25 years to collect on verdict barred interest on the verdict otherwise appropriate).

Although the causes for delay are irrelevant, the record shows that Kaiser (by filing voluminous motions, the bulk of which were denied), compounded by the District Court (in taking 2 years to rule), were responsible for the delays. Plaintiffs did not file *any* post-trial motions, and instead fought to sustain and collect on the initial liability and judgment in 1979, *which turned out to have been $4 million too low.*

entitled to the time value of money over periods of delays in the judicial process.[11]

Moreover, every delay in this protracted litigation is attributable to unsuccessful motions by Kaiser, including: (1) its 1977 motion for directed verdict granted by the District Court, but overruled by the Court of Appeals in 1978; (2) its 1979 post-trial motions denied as to liability, but granted to allow a new trial on damages in which a higher amount was awarded;[12] and (3) its 1981 post-trial motions granted in part by the District Court, but overruled by the Court of Appeals in 1984. In 1979, Kaiser asked for and took the risk of a new trial limited to damages only, and the practical result was that the 1979 trial and judgment actually had been fair to Kaiser, but had resulted in a trebled award $4 million too low.[13]

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[11] *See* Plaintiffs' Opening Brief at 13-17; Note, *Interest on Judgments in the Federal Courts*, 64 Yale L.J. 1019, 1048 (1955).

[12] Although Plaintiffs believe the District Court was incorrect in granting a new trial on damages because Plaintiffs' evidence on damages in 1979 was sufficient under *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 264-265 (1946), and *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 122-125 (1969), to sustain the award and was not contradicted by *any evidence* from Kaiser, – that issue is irrelevant.

Kaiser's request to deny interest over the 2 years the District Court took to decide its motions is, in effect, an objection to the very procedure it requested, under which a second jury would and did recalculate what the correct award should have been as of 1979, based on the 1979 jury's liability findings and the liability evidence from the 1979 trial.

On the retrial, the 1981 jury conclusively determined that the appropriate award as of 1979 should have been even higher than the 1979 jury had found. Kaiser requested this bifurcated procedure, not Plaintiffs, and – as stated by the District Court – Kaiser "should not be permitted to object to the procedure itself just because its outcome is not to their liking." (J.A. 155).

[13] Kaiser's suggestion of any variance between damage evidence at the 1979 trial and the 1981 trial is wrong on the record (J.A. 129), and is precluded by the Court of Appeals' rejection of Kaiser's contentions hat the evidence at the two trials varied (J.A. 198-200).

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Fault for delay is irrelevant. Kaiser cannot escape payment of 2½ years of interest because of the 2 years the District Court took to rule on Kaiser's own post-trial motions.

3. KAISER'S UNSUPPORTED CONTENTION THAT COURTS LACK AUTHORITY TO AWARD INTEREST FROM THE ORIGINAL DATE LIABILITY WAS FIXED: Kaiser Irrationally Argues That The Court Of Appeals Cannot Award Interest From The Date Of A 1979 Judgment That Was Never Vacated As To Liability

(a) Kaiser Cites No Decisions Of This Court Denying Interest

Kaiser, in an inequitable twist of logic, argues in its Response at 13 that four of this Court's decisions *allowing* interest from the original judgment on a reduced amount (i.e., where the amount of the judgment is *reduced* on appeal), support a *denial* of interest in the present case, even though the amount of the original judgment was *increased* on the same liability finding.

Kaiser's argument makes a mockery of the reasoning of Mr. Justice Holmes in *De La Rama v. De La Rama*, 241 U.S. 154, 159 (1916), which supports Plaintiffs' position that: Plaintiffs are entitled to interest from the original judgment in 1979 because (in the words of the Court) "that was the date at which but for delays of the law [Plaintiffs] would have received their dues, [and Defendants have] had the use of the money meanwhile * * * ." *See* Plaintiffs' Opening Brief at 20 & n.30.

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Kaiser incorrectly suggests (Response at 16, n.11), without citation to the record, that one portion of Plaintiffs' damages "included an element of damages for the period following May 31, 1977." That statement is expressly contradicted by the record and the evidence at both the 1979 and 1981 trials. At both trials, Plaintiffs' expert used a discount factor to measure diminution of the value of the business as a going concern as of May 31, 1977. See Plaintiffs' Pretrial Statement Re: Damages, District Court Docket Entry No. 470; J.A. 129.

As Mr. Justice Holmes postulates, the Plaintiffs are entitled to interest on that amount which the court *ultimately* determines was properly due *from the beginning*. If the amount is less than originally awarded, interest runs on the reduced amount. Conversely, if based on the *same* liability finding, it is determined that a larger sum was due; the logic of Mr. Justice Holmes compels an award on the increased amount from the original date liability was fixed. Plaintiffs' Opening Brief at 29-30.

Kaiser's contention seeking to deny interest from the original judgment in 1979 (never vacated as to liability) because the original damage award was vacated and retried (Kaiser Response at 13-14), disregards this Court's rule that in awarding interest from the original judgment, "[e]quity regards the substance and not the form." *Kneeland v. American Loan & Trust Co.*, 138 U.S. 509, 511-512 (1891).

The substance of events between 1979 and 1981, was:

(1) Kaiser asked for a retrial of the amount of damages measured as of 1973 to 1977, hoping to do better by offering its own evidence it had failed to present in 1979,

(2) the court (after waiting 2 years to rule) granted Kaiser's request for a retrial of damages only, and

(3) the 1981 jury reaffirmed and even increased the 1979 jury's damage award conclusively establishing, based on the 1979 liability finding and evidence, that the 1979 multimillion dollar judgment had been $4 million too low.

Kaiser fails to state any meaningful distinction between the present case and this Court's decisions *allowing* interest from the date of the original judgment, and cites *no authority whatsoever from this Court denying such interest.*

(b) Kaiser States No Basis To Disregard The Overwhelming Majority Rule That Interest Runs From The Date Of The Original Judgment (1979)

Kaiser argues, without any basis in logic or policy, that three Court of Appeals decisions (cited and relied upon by

Plaintiffs) allowing interest from the date of *vacated* original treble-damage antitrust judgments were wrongly decided. Kaiser Response at 20-21.

To the contrary, in carrying out the fourfold purposes of interest, the foregoing three decisions, – two of which were joined in by Mr. Justice Kennedy, who was then a member of the Ninth Circuit,[14] – are not only correct, but are also consistent with the overwhelming weight of authority in the Courts of Appeals, including an opinion written by Mr. Justice Blackmun when he was a member of the Eighth Circuit.[15] *See* Plaintiffs' Opening Brief at 24 & n.36.

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[14] *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985); *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980).

[15] *1st Cir.: Clifford v. M/V Islander*, 882 F.2d 12, 1989 U.S. App. LEXIS 11643, *8 (1st Cir. 1989) (interest from original judgment, despite subsequent vacation and remand of damage award); *United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875, 876-77 (1st Cir. 1971) (interest from date of original liability judgment in 1969, despite vacation, remand and subsequently recalculation of treble damages).

2d Cir.: Cf. Chemical Bank & Trust Co. v. Prudence-Bonds Corp., 213 F.2d 443, 444-45 (2d Cir.) (step-up of principal amount), *cert. denied*, 348 U.S. 856 (1954). Plaintiffs' Opening Brief at 29-30.

3d Cir.: Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897, 927 (3d Cir. 1985) ("interest on the amount of the recalculated award from the date of [the] original order allowing the award"); *Mascuilli v. United States*, 383 F. Supp. 50 (E.D. Pa. 1974) (interest from correct entry of liability in 1968, despite two later reversals and remands on damages), *aff'd*, 519 F.2d 1398 (3d Cir. 1975). Plaintiffs' Opening Brief at 21-22 & n.32, 26-30.

4th Cir.: Cf. The Kia Ora, 252 Fed. 507, 511 (4th Cir. 1918) (interest on increased amount from date of modified original judgment).

5th Cir.: In re Incident Aboard the D/B Ocean King, 877 F.2d 322, 323-24 (5th Cir. 1989) (interest from original judgment despite two intervening reversals, remands and recalculations); *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 848 F.2d 613, 624 (5th Cir. 1988); *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542, 545 (5th Cir. 1983).

6th Cir.: Bailey v. Chattem, Inc., 838 F.2d 149, 150, 154 (6th Cir.), *cert. denied*, 108 S. Ct. 2831 (1988); *Petition of United States Steel*

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Kaiser totally ignores this authority expressly contradicting its position. Interest on the judgment should be awarded from the date of the original judgment establishing liability, even where that original judgment has been wholly or partially vacated as to damages.

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Corp., 479 F.2d 489, 508 (6th Cir.) (interest from original judgment where original awards had been vacated, remanded and recalculated), *cert. denied*, 414 U.S. 859 (1973).

7th Cir.: Compare Merit Ins. Co. v. Leatherby Ins. Co., 728 F.2d 943, 945 (7th Cir. 1984) (interest from original judgment vacated and reinstated on same liability finding), *with Needham v. White Laboratories, Inc.*, 847 F.2d 355, 361-62 (7th Cir. 1988) (no interest from original judgment where liability was retried); *see also Water Technologies Corp. v. Calco Ltd.*, 714 F. Supp. 899, 910 (N.D. Ill. 1989) (interest on fee award from original award despite remand by Fed. Cir. for recalculation).

8th Cir.: Cf. Ralston Purina Co. v. Parsons Feed & Farm Supply, Inc., 416 F.2d 207, 213 (8th Cir. 1969) (interest credited on counterclaim from date of original judgment to offset interest on plaintiff's judgment although counterclaim was reversed and remanded for retrial) (opinion by Mr. Justice Blackmun, then a member of the Eighth Circuit).

10th Cir.: Northern Natural Gas Co. v. Hegler, 818 F.2d 730, 737-38 (10th Cir. 1987) (interest on judgment should commence as of the original 1974 liability judgment, despite reversal and recalculation of damages), *cert. dismissed*, 109 S. Ct. 28 (1988).

11th Cir.: Cf. Georgia Association of Retarded Citizens v. McDaniel, 855 F.2d 794, 799 (11th Cir. 1988) (interest on modified award of costs from date of vacated original judgment).

D.C. Cir.: Lopez v. Rodriguez, 668 F.2d 1376, 1381 (D.C. Cir. 1981) (interest from date of original judgment despite remand to recalculate damages).

Fed. Cir.: Cf. Mathis v. Spears, 857 F.2d 749, 760 (Fed. Cir. 1988) (interest from judgment establishing liability for fees, not from subsequent date of calculation).

(c) The Single Lower Court Decision Cited By Kaiser To Support Denial Of 2½ Years Of Interest On A Multimillion Dollar Judgment Has No Bearing On The Facts Or Legal Issues In This Case

Kaiser incorrectly argues that this case should be controlled by a decision of the Seventh Circuit under Illinois law in *Needham v. White Laboratories, Inc.*, 847 F.2d 355 (7th Cir. 1988), in which the court expressly refused to consider the appropriate interest as a matter of federal law or 28 U.S.C. §1961 and instead held that an Illinois statute prohibited interest over the period between two *separate* trials on *liability*, not damages. That case is entirely distinguishable from the present case on its facts and the law.[16] *Kaiser's Response cites no other case denying interest for the period after entry of the original judgment in a civil action.*

4. KAISER'S MISLEADING CONTENTION THAT INTEREST ON THE JUDGMENT SHOULD BE GOVERNED BY STANDARDS FOR *PRE*JUDGMENT INTEREST WHICH IS NOT EVEN SOUGHT: Plaintiffs Seek Interest On The Judgment From The Date Of The 1979 Judgment – Not *Pre*judgment Interest For The Six-Year Period From 1973 to 1979

Kaiser incorrectly postulates that interest for the period after establishment of liability and entry of the original judgment in 1979 should be governed by standards for prejudgment interest.

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[16] First, in *Needham* the time period involved preceded the liability judgment that was not thereafter disturbed. Kaiser fails to address Plaintiffs' Opening Brief at 25-26 n.37, which demonstrates why the undisturbed liability established in 1979 in the present case makes a much stronger case for interest from the original judgment than either *Handgards* or *Needham*.

Moreover, the *Needham* court felt bound in that diversity action by a state statute which prohibited interest, 847 F.2d at 362; and the court refused to consider the effect of 28 U.S.C. §1961 or other federal court authority for interest because neither party raised those issues, 847 F.2d at 361.

Plaintiffs have not sought *pre*judgment interest for the six-year period before entry of judgment in their favor (1973-1979).[17] Plaintiffs are seeking only interest on the judgment from the date of their original judgment in 1979,[18] which established liability and was the basis for the 1981 recalculation of damages. *See generally Northern Natural Gas Co. v. Hegler*, 818 F.2d 730, 737-38 (10th Cir. 1987) (interest on judgment, not prejudgment interest, ran from date of original 1974 judgment even though vacated and damages recalculated), *cert. dismissed*, 109 S. Ct. 28 (1988); *see also* Plaintiffs' Opening Brief at 20 & n.28.

5. KAISER'S MERITLESS CONTENTION THAT COURTS LACK POWER TO PRESERVE THE INTEGRITY OF THEIR JUDGMENTS: Kaiser's Argument That 28 U.S.C. §1961 Limits The Power Of Appellate Courts To Award Appropriate Interest Is Contradicted By The Language And Equity Of The Statute And By This Court's Holdings

Kaiser has utterly failed to establish that 28 U.S.C. §1961 prohibits the Courts of Appeals from awarding adequate interest at the commercial market cost of money to preserve the

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[17] Kaiser cites three entirely inapplicable lower court cases for the proposition that Plaintiffs should not be entitled to interest after the original 1979 judgment. Kaiser Response at 17. None of those cases has any relevance to the issues on certiorari because they involved requests for *pre*judgment interest over the period *prior* to entry of the original judgment in favor of the plaintiffs. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 561 (7th Cir. 1986); *Trio Process Corp. v. L. Goldstein's Sons, Inc.*, 638 F.2d 661, 663 (3d Cir. 1981); *TWA, Inc. v. Hughes*, 449 F.2d 51, 80 (2d Cir. 1971), *rev'd on other issues*, 409 U.S. 363 (1973).

[18] Kaiser misleadingly cites *West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987), for the irrelevant proposition that prejudgment interest "serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered," without acknowledging that Plaintiffs are seeking something entirely different, – i.e., interest on the judgment *for the period after entry of the original judgment in their favor (1979)*, not prejudgment interest for the six-year period (1973-1979) up to entry of the original judgment.

value of judgments that Court enters.[19] To the contrary, as pointed out in Plaintiffs' Opening Brief at 35-36 & n.55, and ignored by Kaiser,[20] §1961(c)(4) specifically exempts judgments of Courts of Appeals from its scope to ensure that §1961 does not encroach on the inherent and equitable power of the Courts of Appeals and the co-equal statutory provisions for interest on federal appellate court judgments under 28 U.S.C. §1912 and Fed. R. App. P. 37 & 38.

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[19] Contrary to Kaiser's mischaracterizations of the record and the issue presented (Kaiser Response at 27), Plaintiffs seek *interest on the Court of Appeals' judgment* of December 27, 1984. *See* Brief for Respondents on Kaiser's Petition in No. 88-1595 at 5-6.

Kaiser contends (Kaiser Response at 27) that 28 U.S.C. §1912 does not grant power to award interest in the present case because the December 27, 1984 judgment of the Court of Appeals was not an "affirmance" of any earlier judgment.

That contention is a blatant mischaracterization of the record: The Court of Appeals affirmed the 1979 liability, and the express language of the Court of Appeals 1984 judgment "*affirms*" the 1981 judgment (J.A. 210), which is in turn composed of the 1979 liability finding and the 1981 damage recalculation. The facts conclusively established in the 1981 damage recalculation reaffirmed the 1979 damage calculation. In form, as well as substance, Kaiser's arguments are contradicted by the record.

[20] Rather than distinguishing the *specific interest authorities* relied upon by Plaintiffs, Kaiser ignores the conceded purposes behind interest awards and argues that other inapplicable policy concerns prohibit the Court from carrying out the purposes behind interest awards.

For example, Kaiser's Response at 25-27 relies heavily on *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240 (1975) (no common law right to attorneys' fees), although neither the holding nor the principles discussed in that opinion support the denial of adequate interest:

(1) interest was not at issue in *Alyeska*;

(2) the interest award sought by Plaintiffs is consistent with the Clayton Act and Fed. R. App. P. 37, 28 U.S.C. §1912, and 28 U.S.C. §1961(c)(4);

(3) interest to preserve the value of judgments and the efficacy of court-ordered relief is within the inherent power of the court,

(Continued on following page)

Kaiser's Response does not even attempt to rebut or refute the existence of at least seven separate bases for appellate court power to award "interest in the exercise of its discretionary power to award proper relief, [as opposed to] deciding what §1961 allows." Note, *Interest On Judgments In The Federal Courts*, 64 Yale L.J. 1019, 1042 n.118 (1955) (quoted in Plaintiffs' Opening Brief at p. 30 n.43 & p. 33 n.52).[21]

(Continued from previous page)

and federal common law favors interest awards, whereas it does not favor attorneys fee awards without express statutory authority such as 15 U.S.C. §15.

Other cases such as *Mansell v. Mansell*, 109 S. Ct. 2023 (1989); *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988) (express statutory prohibition of procedure sought); *Thomas v. Arn*, 474 U.S. 140 (1985); and *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981), relied upon by Kaiser, have nothing whatsoever to do with interest awards or the issues in this case.

[21] 1. *Inherent power* of courts to award adequate interest *to prevent irreparable harm* in conjunction with the courts' inherent power to stay execution on judgments. Plaintiffs' Opening Brief at 33-34.

2. *Inherent power* of courts *to protect the efficacy of the relief they order.* Plaintiffs' Opening Brief at 32-33.

3. *Inherent power* of federal courts *to fashion remedies to correct a wrong* against a federally protected right. Plaintiffs' Opening Brief at 35 n.54.

4. *General equitable power* of federal courts to award interest warranted in equity. Plaintiffs' Opening Brief at 14-15, 36-40.

5. *Equitable power to award restitution* pursuant to the broad congressional grant of equity power in the Clayton Act, 15 U.S.C. §26. Plaintiffs' Opening Brief at 37 n.58.

6. *Statutory power pursuant to 28 U.S.C. §1912* for appellate court to award appropriate interest on affirming the 1979 liability finding and 1981 damage recalculation. Plaintiffs' Opening Brief at 36.

7. *Power under Fed. R. App. P. 37* to award appropriate interest, without limitation as to rate, and approved by Congress pursuant to the Rules Enabling Act, 28 U.S.C. §2072. Plaintiffs' Opening Brief at 40-41 & n.63.

Moreover, Fed. R. App. P. 37 expressly directs that Courts of Appeals' mandates "shall contain instructions with respect to the allowance of interest."[22] The Courts of Appeals retain discretion over the rate of interest[23] to carry out the fourfold purposes of interest awards.[24]

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[22] Kaiser ignores that Plaintiffs are seeking interest on a Court of Appeals judgment which is effectively within the inherent power of that court. *See generally Briggs v. Pennsylvania R. Co.*, 334 U.S. 304 (1948); Note, *Interest On Judgments In The Federal Courts*, 64 Yale L.J. 1019, 1042 n.118 (1955). Indeed, Plaintiffs sought recall of the Court of Appeals' mandate to award appropriate interest (J.A. 75-76), but the court below determined that the issues were appropriately raised by separate appeal (J.A. 76).

The present case involves Fed. R. App. P. 37, not 28 U.S.C. §1961, because the issue is interest on the Court of Appeals' 1984 judgment. The Court of Appeals, having decided the correct disposition of the case, appropriately should determine what interest is due under Fed. R. App. P. 37.

[23] *Cf. West Wisconsin Ry. Co. v. Foley*, 4 Otto (94 U.S.) 100, 103 (1876) (award under S. Ct. Rule should be adjusted to accurately "compensate to some extent for the loss which results from delay").

S. Ct. R. 49, which is not at issue in this case, still follows the old procedure similar to the District Court judgment interest provision in 28 U.S.C. §1961 before it was amended by the 1982 Federal Courts Improvement Act – *i.e.*, reference to state law. Under Pennsylvania law, restitutionary market rate interest should be recoverable rather than 6% simple. *See generally Peterson v. Crown Financial Corp.*, 661 F.2d 287 (3d Cir. 1981); *Rizzo v. Haines*, 520 Pa. 484, 555 A.2d 58, 69-70 (1989). *But cf. Ball v. Rolling Hill Hospital*, 359 Pa. Super. 286, 518 A.2d 1238 (1986) (rate for interest on judgments in Pennsylvania limited to 6% simple in non-restitutionary proceeding).

[24] The cases cited in Kaiser's Response at 28-30, attempting to limit the broad power conferred under Fed. R. App. P. 37, are inapposite because they all deal with local rules promulgated under 28 U.S.C. §2071, which - unlike Fed. R. App. P. 37 which was promulgated under 28 U.S.C. §2072 – are not submitted to Congress for approval. Rules promulgated under 28 U.S.C. §2072 supersede contrary laws. *See* Plaintiffs' Opening Brief at 41 & n.65.

Kaiser ignores or misconstrues the longstanding authority of this Court that federal appellate courts have the power to award interest on the judgment independent of 28 U.S.C. §1961.[25]

Kaiser's Response at 23-24, in support of its contentions, cites only *Pierce v. United States*, 255 U.S. 398, 406 (1921), which is entirely inapplicable to the present case because it involved a request for interest on a criminal fine over periods prior to any entry of a civil action judgment against any of the defendants before the Court.[26]

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[25] *Perkins v. Fourniquet*, 14 How. (55 U.S.) 328 (1852) (allowing interest on a decree in equity under 28 U.S.C. §1912); *Mitchell v. Harmony*, 13 How. (54 U.S.) 115, 147-149 (1851); *Boyce's Executioners v. Grundy*, 9 Pet. (34 U.S.) 275, 289 (1835); *cf. Texas v. New Mexico*, 482 U.S. 124, 132-133 n.8 (1987); *National Bank of Commonwealth v. Mechanics National Bank*, 4 Otto (94 U.S.) 437 (1876) (interest on award of Comptroller of Currency as if it were interest on a judgment, also exercising discretion to order appropriate *compounding* to reflect reality); *Amis v. Smith*, 16 Pet. (41 U.S.) 303, 311 (1842) (interest on judgment without any federal statutory authority).

[26] Moreover, the dicta Kaiser cites from the *Pierce* case, which was decided in 1921, has been superseded by the merger of law and equity and abolishment of common law pleading in 1938.

Kaiser argues this Court stated in *Pierce* that "at common law judgments do not bear interest." As this Court noted in *Perkins v. Fourniquet*, however, even though at common law a judgment does not necessarily carry interest, "damages may be recovered for the detention of the debt in an action on the judgment." 14 How. (55 U.S.) 328, 331 (1852).

Under modern Federal Rules of Civil and Appellate Procedure, those damages that always could have been recovered for detention of the debt in a separate action on the judgment can be awarded as interest by federal appellate courts. *See* Plaintiffs' Opening Brief at 34 & n.53.

6. KAISER'S REMARKABLE CONTENTION THAT PLAINTIFFS, NOT DEFENDANTS, ARE THE GREEDY ONES: Kaiser Does Not Dispute That Monthly Average Prime, Compounded Monthly, Is An Accurate Measure Of The Cost Of Money To Business Litigants

Kaiser's argument that Plaintiffs seek "overcompensat[ion]" by demanding commercial market rates turns this case on its head. Kaiser, overlooking that it benefitted at market rates by more than $18.5 million, makes the totally false and unsupported argument that Plaintiffs would have put their money in a savings account, rather than pay off their debts (at prime plus 2.5 points (J.A. 290)) or rebuild their destroyed business.[27] Moreover, had Plaintiffs simply placed the money in a sound investment fund, it would now be worth as much as from $34 to $120 million.[28]

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[27] Kaiser cannot seriously contend that a giant monopolist has the privilege to destroy small competitors and force them to place any capital they have in savings accounts rather than engaging in business enterprises. The original 1979 judgment was entered in favor of Columbia Metal Culvert Co., not its Transferees in Liquidation and Dissolution. *Compare* J.A. 91, *with* J.A. 146.

[28] For example, if Plaintiffs had invested $9,567,939 in the Fidelity Magellan Fund in 1979, a recognized respectable growth fund, the investment would be worth more than $120 million today. *See* Lipper Analytical Services, Inc., *Lipper-Mutual Fund Performance Analysis*, 2d Quarter Report 1989 ("Lipper"), p. 6; *see also* N.Y. Times, Sept. 17, 1989, at F8 (advertisement) ($10,000 invested in 1979 worth $126,000 in 1989). If they had invested in a mutual fund with average performance, Plaintiffs' $9,567,939 as of 1979 would now be worth:

- ¶ over $40 million according to the weighted index of all "growth funds" (324% increase from June 30, 1979 to June 30, 1989);
- ¶ over $40 million according to the weighted index of all "growth and income funds" (336% increase for same period);
- ¶ over $34 million according to the weighted index of all, more conservative, "balanced funds" (257% increase for same period).

Lipper, p.5.

Kaiser has not contested that monthly average prime rates, compounded monthly, are a conservative measure of its cost of money (J.A. 303-08). Contrary to Kaiser's suggestion that prime interest rates, compounded monthly, would overcompensate Plaintiffs, the overwhelming weight of authority, discussed in Plaintiffs' Opening Brief at 43-44, and which Kaiser fails even to acknowledge, holds that prime interest rates are a conservative objective measure of the cost of money to business litigants.[29]

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[29] Plaintiffs' Opening Brief at 43-44; *see also Gorenstein Enterprises, Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 436-37 (7th Cir. 1989) (prime rate applies to prejudgment interest and ideally should govern interest on judgments as well; although court apparently received no arguments from parties on issues in the present case and applied T-bill rate under §1961); *EEOC v. Guardian Pools, Inc.*, 828 F.2d 1507 (11th Cir. 1987) (prejudgment interest and interest on judgment at "IRS prime," although court confused on provisions of §1961 and apparently received no arguments from parties on issues in the present case); *cf. In re Camino Real Landscape Maint. Contr., Inc.*, 818 F.2d 1503 (9th Cir. 1987) (interest based on debtors' cost of money, rather than floating monthly rates in amended 26 U.S.C. § 6621); *Northern Natural Gas Co. v. Hegler*, 818 F.2d 730, 737-38 (10th Cir. 1987) (trial court had discretion to set interest at rates in accordance with the real world), *cert. dismissed*, 109 S. Ct. 28 (1988); *Devex Corp. v. General Motors Corp.*, 749 F.2d 1020 (3d Cir. 1984) (discretion to pick state law rate that best carries out purposes of interest), *cert. denied*, 474 U.S. 819 (1985). *See generally Peterson v. Crown Financial Corp.*, 661 F.2d 287, 298 (3d Cir. 1981) (prejudgment interest at higher than legal rate in restitution action); Note, *The Postjudgment Interest Rate in Pennsylvania: Ignoring Reality For Too Long*, 23 Duq. L. Rev. 1083, 1088 (1985) (legal rate below market rate is a "bonanza" for judgment debtors and "a polite form of highway robbery from judgment creditors"); Reitz, *Interest on Judgments in Federal Litigation*, J.A. 224 (1986) (delay in payment of judgment is an involuntary loan and market interest rate is necessary to compensate plaintiff).

7. KAISER INCORRECTLY ARGUES THAT THE COURTS SHOULD IGNORE ECONOMIC REALITY: Recognition Of Economic Reality By Objective And Accurate Measure Of The Cost Of Money Is Within the Power Of The Courts Of Appeals To Carry Out the Fourfold Purposes Of Interest

Kaiser argues for a system in which delays in the judicial process can severely dilute the value of judgments, creating overriding incentives to delay and complicate litigation after an adverse judgment.

The Court of Appeals, having finally determined the appropriate final judgment in favor of Plaintiffs on the merits, has the power to award proper interest to adequately preserve that judgment against diminution due to loss of the time value of money over periods of post-trial and appellate proceedings. Neither 28 U.S.C. §1912 nor Fed. R. App. P. 37 place any arbitrary limits on the rate of interest to be awarded over periods of delay in the judicial process, and 28 U.S.C. §1961, taken in the context of appellate court interest provisions and § 1961(c)(4), does not even purport to limit the power of the Courts of Appeals to protect the full measure of the relief they order. Simply to protect the full measure of the relief they order, Courts of Appeals should exercise their inherent and equitable power where appropriate, as in cases such as this, to award commercial market interest to fulfill the fourfold purposes of interest awards, where failure to do so would result in severe diminution of the value of the judgment.

CONCLUSION

For the reasons stated in Plaintiffs' Opening Brief and in this Brief, Plaintiffs ask this Court to reaffirm the inherent and equitable power of the Courts of Appeals and their authority under Fed. R. App. P. 37 to award adequate interest to carry out the purposes of interest awards.[30]

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[30] Plaintiffs also incorporate the Conclusion of their Brief for Respondents on Kaiser's Petition in No. 88-1595.

Plaintiffs request that the Court remand to the Court of Appeals with instructions to award appropriate interest on $9,567,939 at monthly average prime rates (as reported by the Federal Reserve Bank), compounded monthly, from August 22, 1979 to the date of full payment of all principal and interest.

Respectfully submitted,

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